

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

|                                  |   |                           |
|----------------------------------|---|---------------------------|
| <b>UNITED STATES OF AMERICA,</b> | ) | <b>CASE NO. 8:06CR61</b>  |
|                                  | ) |                           |
| <b>Plaintiff,</b>                | ) |                           |
|                                  | ) |                           |
| <b>vs.</b>                       | ) | <b>TENTATIVE FINDINGS</b> |
|                                  | ) |                           |
| <b>DALINDA GARCIA,</b>           | ) |                           |
|                                  | ) |                           |
| <b>Defendant.</b>                | ) |                           |

The Court has received the Presentence Investigation Report ("PSR") and the Defendant's objections thereto (Filing No. 149). See Order on Sentencing Schedule, ¶ 6. The Court advises the parties that these Tentative Findings are issued with the understanding that, pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the sentencing guidelines are advisory.

The Defendant objects to ¶¶ 38, 42, 45 and 78. The Defendant objects to the dangerous weapon enhancement being assessed without it being pled in the Information and having been proved to a jury beyond a reasonable doubt.

The Eighth Circuit has stated that enhancements are to be proved by a preponderance of the evidence as opposed to beyond a reasonable doubt. See, e.g., *United States v. McDonald*, 2006 WL 2589438, at \*1 (Sept. 11, 2006) (citing *United States v. Pirani*, 406 F.3d 543, 551 n.4 (8<sup>th</sup> Cir. 2005)). The objection is denied.

**IT IS ORDERED:**

1. The Defendant's Objections to the Presentence Investigation Report (Filing No. 149) are denied;
2. Otherwise the Court's tentative findings are that the Presentence Investigation Report is correct in all respects;

3. If **any** party wishes to challenge these tentative findings, the party shall immediately file in the court file and serve upon opposing counsel and the Court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law, and (c) if an evidentiary hearing is requested, a statement describing why an evidentiary hearing is necessary and an estimated length of time for the hearing;

4. Absent submission of the information required by paragraph 3 of this Order, my tentative findings may become final; and

5. Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing.

DATED this 12<sup>th</sup> day of September, 2006.

BY THE COURT:

s/Laurie Smith Camp  
United States District Judge